

The SHOSHONE-BANNOCK TRIBES

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February 13, 2014

Geoffrey C. Blackwell, Chief
Office of Native Affairs & Policy
Consumer and Governmental Affairs Bureau
Federal Communications Commission
44512th Street, SW
Washington, DC 20554

RE: Proposed Draft Program Comment to Streamline Section 106 Review for Positive Train Initiative

Dear Mr Blackwell:

The Shoshone-Bannock Tribes (Tribes) Heritage Tribal Office (HeTO) appreciates the opportunity to comment on the proposed Draft Program Comment to Streamline Section 106 Review for Positive Train Initiative. According to the information provided, the Positive Train Control (PTC) Deployment Project will consist of the installation of more than 20,000 wayside poles nationwide 1-3 miles apart, between 25-65 feet in height, excavated holes 5-15 feet in depth which will vary from 12-15 inches in diameter, where in some cases, the depth of the foundation hole may exceed the depth of the previous disturbance. Also the construction of an estimated 3,000-4,000 additional antennas to serve as base stations which you have described as the majority being collocated on existing structures. The Rail Safety Improvement Act of 2008 (P.L. 110-432) (RSIA) which requires the deployment of PTC systems along most segments of their tracks, has the potential to adversely affect ancestral lands inherent to the Shoshone and Bannock people. These inherent ancestral lands continue to hold important cultural properties, traditional hunting, fishing and gathering activities practiced today by members of The Shoshone-Bannock Tribes.

Upon review of the *WT Docket No. 13-240*, dated *September 27, 2013*, *COMMENT SOUGHT ON SCOPING DOCUMENT FOR DEVELOPMENT OF A PROPOSED PROGRAM COMMENT TO GOVERN REVIEW OF POSITIVE TRAIN CONTROL FACILITIES UNDER THE SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT*, *Comment date: November 6, 2013*, it states, "*The FCC is the lead, or action, federal agency because the construction of the PTC facilities requires the use of radio spectrum that is licensed by the FCC. Our process for developing the Program Comment includes government-to-government consultation with federally recognized Indian Tribes in accordance with Section 800.14 (e) (4) and (f) of the ACHP rules and in accordance with the trust relationship we share with sovereign Tribal Nations as outlined in the FCC's Statement of Policy on Establishing a Government-to-Government relationship with Indian Tribes (16 FCC Rcd 4047, 4081 (2000)).*" As the lead federal agency, the FCC failed to uphold their trust responsibility to tribes allowing a non-compliance of Section 106 of the National Historic Preservation Act (NHPA) of facilities that were constructed without review. This has led to the Program Comment to be drafted tailored to expediate the mission and needs of the Railroads Positive Train

Control Initiative. "Expediting" projects has led to mitigation for previously constructed facilities (a major factor) conducted by the Railroads and seem to have been put on the backburner as in the case of the "Twilight Towers" which has been described as being in regulatory limbo.

The Shoshone-Bannock Tribes HeTO realizes the significance of safety issues in regards to the Railroads; however, the preservation of remnants of culturally significant sites of the first original people of these lands should not be dismissed. The Nationwide Programmatic Agreement (NPA) has been subject to modification to expedite the Section 106 Process through a Program Comment to fit the needs of corporations which may set precedent and perhaps alter the original intent of the NPA. Listed below are some of the following issues that need to be addressed:

- The Tribes HeTO has only recently been aware of this project and has not had the opportunity to research all the documentation concerning the Draft Program Comment to streamline Section 106 Review for Positive Train Initiative. The FCC, who is the lead federal agency, has an obligation to uphold its Trust Responsibility to conduct Government-to-Government consultation with the Shoshone Bannock Tribes. All federally recognized tribes will be affected by the Draft Program Comment which will carry out a major role in the protection and preservation of significant cultural resources, prehistoric archaeological sites of tribes that will also affect possible sacred sites and traditional cultural properties. Complete project information of the Positive Trail Control should have been included for all tribes as this as I understand it will eventually affect all railroads of the United States. For tribes to actively participate, additional meetings needed to occur, not only in Tulsa and Rapid City. If this is to affect all tribes, FCC must provide true and meaningful consultation to the Shoshone-Bannock Tribes according to Executive Orders discussing the review process and how to create an efficient, practical and timely response to the congressional deadline. Consultation with tribes should be included in the discussion with the ACHP and FCC after formal submission of the Program Comment to the ACHP.
- Non- concurrence with the Draft Program Comment requiring a ¼ mile visual APE for the poles installed during this project, it would set a precedent for towers less than 200 feet that currently require a ½ mile visual APE.
- VI. Addressing Adverse Effects to Historic Properties. The Section 106 process does not prevent projects from being completed "SIMPLY" because there will be an adverse effect to historic properties. The word "SIMPLY" needs to be removed; the Tribes do not consider significant archaeological resources "SIMPLE".
- A definition and clarification of what "memorialized in a public comment" means, quoted from 4IV of the Public Notice, dated September 27, 2013, *COMMENT SOUGHT ON SCOPING DOCUMENT FOR DEVELOPMENT OF A PROPOSED PROGRAM COMMENT TO GOVERN REVIEW OF POSITIVE TRAIN CONTROL FACILITIES UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT*.
- The Draft Program Comment has excluded from Review for Effects on Railroad Track and Track Bed. Many Railroads were constructed prior to having to comply with any NHPA laws. Land underneath the tracks and bed may contain cultural resources/human remains which would be the reasoning of monitoring any type of ground disturbance or excavation because subsurface material will most likely be revealed.
- The base stations are described as being located farther away from the tracks. How Far? And why does the Program Comment not apply to Section 106 review of base station construction? The antennas outside of the Right of Way need to identify the areas and staging area for construction on

poles and antennas. The installation of the wayside poles and base stations will adversely affect the integrity of feeling and setting.

- Section III. Applicability. The Program Comment does not apply on "Tribal lands". Please state how Section 106 process applies on Indian lands. 36CFR80016 defines tribal lands as lands within the exterior boundaries of the reservation.
- Section IV. Exclusions. 1. Please clarify exclusion within 50 feet of the Right Of Way. Does this include new ground disturbance will be excluded from Section 106 review? Terms such as "conditionally excluded from" and "substantial increase in size" are vague regarding the PTC wayside structures. These "similar" structures should be identified.
- Section IV. Exclusion. 2. It is unclear how the FCC and the applicant will consider the effects of the proposed PTC facilities on historic properties determined eligible for listing on the National Register of Historic Places or those that have been identified as contributing elements to a historic district or any other historic properties ESPECIALLY those properties of traditional, cultural and religious significance to Tribal Nations and archaeological resources underneath the track bed within the APE without consultation from the tribes.
- Throughout the Draft Program Comment, it seems the applicant provides information without the tribes input with the expediated process and through exclusion. Expediting the Section 106 PTC review process may result in a tribe's significant cultural resource being adversely affected without tribes input. Tribes need to be included in that process. When mitigation measures need to be addressed, how and when will the tribes input and participation be addressed? Data Recovery and Excavation isn't the only answer to mitigation.
- Section V. Enhanced Submissions Process. Consultation with the Shoshone-Bannock Tribes needs to occur with the FCC to determine if this will be the preferred method of review. When providing maps, include a regional map with project location. Terms such as "approximately" should be defined or eliminated. Define what, "...in a manner respectful of Tribal sovereignty,"
- The Tribes HeTO currently receives project proposals from applicants that want to place or construct Cell on Wheels (COWs) or communications towers located amidst a multitude of existing communications towers and transmission lines in areas with a multitude of metallic and vertical elements, or that present a moderate vertical contrast to an area already adversely affected by existing modern intrusions and visual impacts which have adversely affected the integrity of setting and feeling. They therefore receive a recommendation of a **no adverse effect to historic properties**, yet contribute to that multitude of metallic and vertical elements and existing modern intrusions and visual impacts.

The purpose if this letter is to provide technical input and not intended as formal government-to-government consultation provided by the Shoshone-Bannock Tribes Heritage Tribal Office. Should there be any questions or concerns please feel free to contact me at (208) 236-1086 and/or email: csmith@sbtribes.com.

Sincerely,

Carolyn Smith
Shoshone-Bannock Tribes
Cultural Resources Coordinator